## UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA.

FRAY AND GREEN *v.* POLLOCK, ET AL.

May 12, 1921.

1. **Ejectment—Joint Action against Several Defendants.**—In an action of ejectment the plaintiff claiming a single tract of land may bring action against several defendants, although they claim independently and have no connection with each other.

2. **Boundaries—Establishment—Substitute for Ejectment.**—Sec. 5490 of the Code of 1919 relating to the establishment of boundaries was intended, and has been used, as a frequently available and convenient substitute for ejectment.

3. **Boundaries—Establishment—Joint Action.**—Sec. 5490 of the Code of 1919 relating to the establishment of boundaries and which provides: "* * * the petitioner shall make defendants to said petition all persons having a present interest in the boundary line sought to be ascertained and designated," must be construed as giving the plaintiff an election to sue severally or jointly, although the defendants may claim severally, and although the several adverse claims may respectively relate to different lines claimed by the plaintiff.

4. **Federal Judiciary Act—Removal of Causes—Construction.**—The federal Judiciary Act, including the clause authorizing removal of causes on the ground of separable controversy (Judicial Code, sec. 28) must be given a restrictive construction.

5. **Actions—Joint or Several—Right of Defendant to Object**—Where a plaintiff, suing in a state court, has a right to sue either severally or jointly, no defendant has a right to say that an action shall be several which the plaintiff seeks to make a joint.

6. **Removal of Causes—Showing Existence of Separable Controversy.**—The existence of a separable controversy must be shown, not by the petition for removal, but by the record at the time of filing the petition for removal.

7. **Removal of Causes—Separable Controversy Not Shown—Remand.**—Where the record at the time of filing the petition for removal in the federal court consisted merely of the plaintiff's pleading and this distinctly did not show the existence of a separable controversy the cause was remanded to the state court.

*Grimsley & Miller,* p. q.; *W. A. Cook,* p. d.

MCDOWELL, DISTRICT JUDGE:

This is a proceeding instituted by petition in the Circuit Court of Madison County for the ascertainment and establishment of

the boundaries of a single tract of land, under section 5490, Code 1919. The plaintiffs are citizens of Virginia. Three of the defendants are citizens of Virginia, and the remaining four defendants are citizens of New York.

In the petition it is alleged that the plaintiffs are proceeding under section 5490 of the Virginia Code; that they are the joint owners of a certain described tract of land in Madison County, Virginia; the seven defendants are named as being all persons having a present interest in the boundary lines sought to be ascertained and designated; the plaintiffs are alleged to be in possession by fee simple title and to have had exclusive possession for more than twenty years. Plaintiffs pray that the defendants be made parties, and that the court will ascertain and designate the true boundary lines of the land as to petitioners and all the coterminous land owners mentioned. From the petition it cannot be learned whether the defendants claim jointly or severally. The New York defendants have removed the case to this court on the ground of separable controversy.

[1-3] The proper construction of the above mentioned state statute in respect to the joinder of parties defendant is a question of some interest, which has not, so far as I know, been adjudicated. In actions of ejectment it has, at least since Camden *v.* Haskill, 3 Rand. 462, 466, (1825), never been doubted that the plaintiff (claiming a single tract of land) had a right to bring a joint action against several defendants, although they may claim independently and have no connection with each other. In the statute under which the present proceeding was brought is the following: "* * * the petitioner shall make defendants to said petition all persons having a present interest in the boundary line or lines sought to be ascertained and designated * * *." This statute, which was presumably enacted with knowledge of the long established right of joinder in actions of ejectment, was intended, and has been used, as a frequently available and convenient substitute for ejectment. This is shown by the language of the statute, by its location in the Code (in the chapter on Ejectment) by the Revisors, and inferentially at least by the reported decisions. Hamman *v.* Miller, 116 Va. 873; Wright *v.* Rabey, 117 Va. 884; Christian *v.* Bulbeck, 120 Va. 74; Collier *v.* Hiden, 120 Va. 543. Moreover, the reason for allowing joinder in ejectment applies with equal force to a proceeding under the statute to ascertain and establish boundary lines. In Greer *v.* Mezes, 24 How. 268, 277, it is said: "In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action

against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him they are all trespassers, and he cannot know how they claim, whether jointly or severally; or if severally, how much each one claims; nor is it necessary to make such proof in order to support his action." The statute in question must therefore, as I believe, be construed as giving the plaintiff an election to sue severally or jointly, although the defendants may claim severally, and although the several adverse claims may respectively relate to different lines claimed by the plaintiff.

[4, 5] The federal Judiciary Act, including the clause authorizing removals on the ground of separable controversy (Judicial Code § 28) must be given a restrictive construction. Smith *v.* Lyon, 133 U. S. 315, 319; In re Pennsylvania, 137 U. S. 451, 454; Fish *v.* Henarie, 142 U. S. 459, 467; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 449; Missouri Pac. Co. *v.* Fitzgerald, 160 U. S. 556, 583; Camp *v.* Gress, 250 U. S. 308, 312. In accordance with this construction is the settled rule that where a plaintiff, suing in a state court, has a right to sue either severally or jointly, no defendant has a right to say that an action shall be several which the plaintiff seeks to make joint. See Powers *v.* Chesapeake & Ohio Rwy. Co., 169 U. S. 92, 97; Chesapeake & Ohio Ry. Co. *v.* Dixon, 179 U. S. 131; Alabama G. S. Ry. Co. *v.* Thompson, 200 U. S. 206; Chi. B. & Q. Ry. Co. *v.* Willard, 220 U. S. 413; Lomax *v.* Foster Lumber Co., 174 Fed. 959; Davey *v.* Yolo Water Co., 211 Fed. 345; City of Cleveland *v.* Cleveland, etc., R. Co., 147 Fed. 171, 176; Buchanan *v.* W. M. Ritter Lumber Co., 210 Fed. 144.

[6, 7] Another rule leading to the same conclusion is that the existence of a separable controversy must be shown, not by the petition for removal, but by the record at the time of filing the petition for removal. Wilson *v.* Oswego Township, 151 U. S. 56; Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 225-6. The record at the time of filing the petition for removal here consisted merely of the plaintiffs' pleading, and this distinctly does not show the existence of a separable controversy. So far as appears from the plaintiffs' petition all the defendants may claim under the same title and may dispute the same boundary line or lines.

It follows that this cause must be remanded.